Summary of Argument

I.

Section 15 of the Act of June 29, 1906 (from which Section 340 derives) establishes an exclusive and carefully safeguarded procedure for denaturalization. To this end it provides that such proceedings may be instituted only by United States attorneys and makes it their duty (a) to base the proceedings upon an affidavit showing good cause, (b) to bring the proceedings in the district in which the defendant resides and (c) to give 60 days notice in place of the usual 20 days.

The intimate textual connection between the affidavit clause and the venue clause clearly indicates that both are procedural requirements for the institution of proceedings. The phrases "upon affidavit" and "in the court" both modify the language "to institute proceedings", and simply tell how and where the proceedings are to be instituted.

If the Government's interpretation were accepted (*i.e.*, that the clause should be read; "upon *receiving* an affidavit, it shall be the duty", etc.) the language must mean that when a United States attorney receives an affidavit he must institute proceedings pursuant to the notice and venue provisions of Section 340, but that if he does not receive one, he is not bound by these procedural restrictions. That meaning, however, is unreasonable. Moreover, all concede that the other two provisions dealing with venue and notice are exclusive.

There would be no reason to make it the duty of the United States attorney to institute proceedings upon receiving an affidavit showing good cause. He had that duty already. Since the section provides no procedure for enforcing the duty, it would add nothing to existing law. The absence of provisions regulating the participation of "out-

sider" complainants in the proceeding indicates that Congress had in mind simply the usual affidavit of good cause which would be used in moving to vacate a judgment for fraud.

II.

Within a year after the Act of 1906 took effect the Attorney General squarely held that the United States attorney should be furnished with an affidavit showing good cause before he was authorized to institute proceedings. His opinion carried added weight, because an Assistant Attorney General had been chairman of the Commission which drafted the statute. The necessity of such an affidavit was repeated in the first judicial interpretation, in 1912, *Cohen* v. *United States,* 38 App. D. C. 123. Subsequent cases generally adopted the same rule. Even the few decisions which the Government cites to the contrary involved proceedings based upon affidavits, with the defendant's attack based on the adequacy of the affidavit rather than its necessity.

The principal case relied on by the Government, *Schwinn* v. *United States,* 112 F. 2d 1244 (9th Cir., 1940) involved a complaint which recited that an affidavit had been furnished, the real issue being whether the affidavit needed to be proved at the trial.

This Court's decision in *Bindczyck* v. *Finucane,* 342 U. S. 76 (1951), holding that Section 15 (now Section 340) was the exclusive method for revoking a naturalization, repudiated the reasoning of the *Schwinn* decision. The contrary cases cited by the Government are for the most part recent District Court cases, not supported by analysis of the statute or its legislative history.

Denaturalization proceedings create serious consequences for a naturalized citizen, by their mere commencement. The contemporaneous interpretation of the Act of 1906, as requiring an affidavit showing good cause, recog-

nized the importance of American citizenship and the necessity for strict protection of anyone whose naturalization was challenged.

III.

At the time the Nationality Act of 1940 was adopted, the weight of authority still upheld the necessity of an affidavit showing good cause. Three out of four circuits in which there had been recorded opinions had treated the affidavit as mandatory.

Before the 1952 reenactment, this Court had decided the *Bindczyck* case, which tends to support the position that the affidavit is mandatory. No contrary case was called to the attention of Congress.

Administrative practice up to 1952 indicates a general use of such affidavits. Any argument based on congressional reenactment of the section indicates approval of the construction urged by respondent here, rather than the reverse.

IV.

The purpose of Congress, in the light of the background of denaturalization proceedings before 1906, was to create a single procedure which would be effective and would safeguard the rights of defendants. The provision for an affidavit of good cause was first inserted in the bill as a qualification on the power to denaturalize, before the bill contained any reference to the district attorney as the person to institute the proceeding. Its initial wording "upon affidavit made by any credible person" was comparable to the requirement for affidavits in support of a petition for naturalization, and indicated a belief that the requirements to support a denaturalization proceeding should be no less strict than those for verification of naturalization petition. The change from language conferring power on the United States to language making denatu-

ralization the duty of the United States attorneys was part of a series of amendments moved by the floor manager of the bill, at the same time that the restriction on venue was introduced in the bill, and without any indication of intention to change the affidavit of good cause from a qualifying requirement to a mere instrument of compelling action by reluctant district attorneys.

There is no showing in the legislative record of any accusation that United States attorneys were lax in bringing denaturalization actions before 1906. On the contrary, they had been over-zealous in some instances. Congress was concerned with protecting aliens, who might be ignorant of our laws and without resources to defend themselves, against default and consent judgments. The notice and venue provisions of the section were intended to make it easier for such persons to appear and defend themselves. The affidavit requirement is similar and should be considered part of the safeguards which Congress imposed for the benefit of naturalized citizens.

V.

The requirement of an affidavit showing good cause constitutes a reasonable precaution for the protection of naturalized citizens. United States attorneys are furnished, in usual course, with affidavits prepared by the Immigration and Naturalization Service, showing whether good cause for denaturalization exists. Requiring them to submit such affidavits for a judicial determination of their sufficiency at the inception of the proceedings will not create any serious burden. The affidavit showing good cause does not involve any duplication of the complaint, but supplies facts which may disclose whether a complaint stated in general language is supported by the basic information which the Government has available. It will not permit duplicate trials because there is no procedure for cross-examination of the deponents or submission of opposing evidence.

Serious harm can result to any individual from placing in public record official charges of fraud. Congress intended to require that the Court be furnished with an affidavit setting forth the facts before proceedings could be instituted for revocation of United States citizenship.

ARGUMENT

POINT I

The language of Section 340 reveals only one meaning consistent with ordinary rules of English usage—that United States attorneys must base denaturalization complaints upon an affidavit showing good cause.

Grammatically, the affidavit is a requirement of a denaturalization suit.

Although the Government concedes (Br., p. 5) that one of the effects of the Act of 1906 was to establish procedural safeguards in denaturalization, it resists the inference that the affidavit of good cause was a procedural safeguard. It asserts instead that "(t)he provision for an affidavit showing good cause is not placed among the procedural requirements" (Br., p. 5) and is "textually unconnected with anything else in the statute" (Br., p. 11). The fact is that the affidavit provision and the venue provision are both part of the same sentence of Section 340(a). They are both adverbial clauses commencing with prepositions (i. e. "*upon* affidavit"; "*in* any court") which modify the same infinitive clause ("to institute proceedings"):

> "It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court . . . in the judicial district in which the

INDEX

	PAGE
Question Presented	1
Statement	1
The Opinion Below	3
The 1906 Statute	4
Summary of Argument	5
Argument	9
Point I—The language of Section 340 reveals only one meaning consistent with ordinary rules of English usage—that United States attorneys must base denaturalization complaints upon an affidavit showing good cause	9
Grammatically, the affidavit is a requirement of a denaturalization suit	9
The requirements of Section 340 apply to all actions for denaturalization	10
The purpose of the affidavit is not to create a duty on the United States attorney. The affidavit is something which the United States attorney has a duty to supply	12
The word "upon" indicates that the affidavit is the basis of the action	13
Point II—The initial construction of the section, and the weight of authority for over forty years after its enactment, made the affidavit showing good cause a condition precedent to the bringing of a denaturalization action	14

naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship . . . ."*

The Government apparently agrees (Br., p. 36) that this sentence imposes a requirement that United States attorneys bring any denaturalization proceedings only in the defendant's district of residence. Nevertheless it denies that this sentence imposes a requirement that the proceedings be based upon an affidavit showing good cause. To support such a construction of the sentence, the Government must imply a participle which Congress omitted, i. e., it must read the phrase as "upon *receiving* an affidavit" instead of "upon an affidavit".

However, if the phrase is interpreted as a participial clause it must modify everything in the sentence and, therefore, the entire section. The restriction of venue to the district of residence and the provision for sixty days notice would be applicable only if the United States attorney had received an affidavit. The Government has not cited any case, and we know of none, in which a reluctant United States attorney was forced to institute proceedings by an "outsider" affidavit. Therefore the section would apply to practically nothing. This unreasonable intention should not be imputed to Congress.

The requirements of Section 340 apply to all actions for denaturalization.

The Government apparently contends that a suit brought voluntarily by the United States attorney, and not under compulsion of an "affidavit showing good cause", is brought under some other general power which Congress did not intend to cut down by the Act of 1906 (Br., p.

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* The Government quotes this sentence three times in the course of its argument (Brief, pp. 5, 10 and 19). In each case the second part of the sentence, dealing with venue, is omitted.

PAGE

POINT III—The *Schwinn* decision was not adopted by Congress in subsequent reenactments of the Naturalization Act 21

POINT IV—The legislative history confirms that Congress intended to require an affidavit showing good cause as a necessary preliminary step to the institution of denaturalization proceedings 26

The legal background indicates that Congress' purpose in 1906 was to provide a uniform procedure for naturalization and denaturalization 26

The requirement of an affidavit was first inserted in the statute as a qualification on the power to denaturalize, and not as a means of forcing the United States attorney to act 29

There is no showing that United States attorneys were lax in bringing denaturalization actions before 1906 36

Section 15 did not represent a "compromise" with "demands" for bills permitting private citizens to institute denaturalization proceedings 41

POINT V—The affidavit showing good cause constitutes a reasonable precaution for the protection of naturalized citizens 44

CONCLUSION 47

13). This argument meets two difficulties. In the first place, if the power is derived from some other source, it would not be limited by the other procedural requirements of Section 340. In the second place, there is no source of power to bring such an action other than Section 340.

This Court has held and the Government concedes (Br., p. 36) that the notice provision of Section 340 is exclusive. An interpretation which permitted the effect of procedural safeguards to depend upon whether an affidavit was furnished would bring "capricious and haphazard results" (*Cf. Bindczyck* v. *Finucane*, 342 U. S. 76, 85, 1951), and therefore should be avoided. On this point the District Court in the present case said:

> "An interpretation which gives such cavalier treatment to important safeguards insisted on by Congress cannot be sustained" (R. 14).

Not only does the *Bindczyck* case hold that Section 340 is the exclusive source of power to denaturalize, but the present complaint points to no other source. Its first assertion is:

> "1. This is an action under Section 340(a) of the Immigration and Nationality Act, Public Law No. 414, 82d Congress, 2d Session." (R. 2)

Moreover, the summons was based on sixty days' notice (R. 7), rather than the twenty days' notice normally provided in civil actions. In referring specifically to Section 340 of the Immigration and Nationality Act, and providing for sixty days' notice of the action, the Government recognized that the Section applies whether or not the United States attorney has received an affidavit of good cause. Since the purpose of the section is to prescribe a mode of procedure applicable to all cases, the affidavit must be viewed as a procedural requirement.

CASES

PAGE

Application of Barnes, 219 F. 2d) 137 (2d Cir., 1955), cert. pend. sub nom Falcone v. Barnes, No. 47 24

Baumgartner v. United States, 322 U. S. 655, 675 (1944) 45

Bindczyck v. Finucane, 342 U. S. 76 (1951) 6, 7, 11, 15 18, 19, 20, 22, 23, 27, 38, 40, 41

Cohen v. United States, 38 App. D. C. 123 (1912) ..6, 15, 21

In re Coleman, 15 Blatchf. 406, 6 Fed. Cas. No. 2980 (C. C. S. D. N. Y., 1879) 35, 37

Commissioner v. Sternberger's Estate, 348 U. S. 187 (1955) 25

Dolan v. United States, 133 Fed. 440 (8th Cir., 1904) 38

Fawcus Machine Co. v. United States, 282 U. S. 375, 378 (1931) 15

Girouard v. United States, 328 U. S. 61 (1946) 25

Gonzales v. Landon, —— U. S. ——, 100 L. ed. (Advance, p. 136) 45

Hazel-Atlas Co. v. Hartford Co., 322 U. S. 238, 248 (1944) 27

Johannessen v. United States, 225 U. S. 227, 242 (1912) 16, 21, 28

Knauer v. United States, 328 U. S. 654 (1946) 45

Lansky et al. v. Savoretti, 220 F. 2d 916 (5th Cir., 1955), pet. for cert. pend., No. 100 24

Norwegian Nitrogen Co. v. United States, 288 U. S. 294, 315 (1933) 15

Obear-Nester Glass Co. v. Hartford Empire Co., 61 F. 2d 31, 34 (8th Cir., 1932) 26

The purpose of the affidavit is not to create a duty on the United States attorney. The affidavit is something which the United States attorney has a duty to supply.

It would be unnecessary for Congress to provide that it is the duty of the United States attorneys to institute denaturalization proceedings *when* they are presented with an affidavit showing good cause. The United States attorneys had always been charged with the duty of enforcing all civil proceedings in which the United States is concerned (Gov. Br., p. 13). *Cf. United States* v. *Smith*, 158 U. S. 346, 353 (1895). Unquestionably it was their duty to seek cancellation of fraudulent certificates when advised of the facts, whether by affidavit or otherwise. Section 340 contains no procedure for reviewing the act of the United States attorney who refuses to perform his duty, and would add nothing to preexisting law if its purpose were to require him to act.

The contention that the provision for an affidavit showing good cause related only to actions on the basis of private complaints is inconsistent with the legislative history of the Act as shown below (Point IV). If that had been Congress' meaning, it would have been reasonable to insert provisions concerning the participation of the private citizen in the trial and his method of enforcing the district attorney's duty if action were not promptly instituted on the basis of his affidavit. The succinctness of the section indicates that the Congress did not have in mind a radical new procedure with all the complications and pitfalls which would require legislative consideration. The form indicates instead that Congress had in mind simply the customary affidavit of good cause which is furnished in moving to reopen a judgment.

PAGE

Schneiderman v. United States, 320 U. S. 118 (1943) 18, 22, 45
Schwinn v. United States, 112 F. (2d) 74, 9th Cir., affd, 311 U. S. 616 (1940) 6, 16, 17, 18, 19, 20, 21, 22
Stenerman v. Brownell, 204 F. (2d) 336, 340 (9th Cir., 1953) 19
Tinn v. United States District Attorney, 148 Cal. 773, 84 P. 152 (1906) 38
Turlej v. United States, 31 F. 2d 696 (8th Cir., 1929) 17
United States v. Stefena Brown (E. D. Mich. unreported, E. D. Mich. Civ. No. 12628, Feb. 15, 1955) 23
United States v. Candela, 131 F. Supp. 249. (S. D. N. Y., 1954) 25
United States v. Favorito, 7 F. R. D. 152, N. D. Ohio, (1945) 22
United States v. Gleason, 78 Fed. 396 (E. D. N. Y., 1897), aff'd sub nom, United States v. Gleeson, 90 Fed. 778 (2d Cir., 1898) 28, 38
United States v. Hartmann, 2 F. R. D. 477 (E. D. Pa., 1942) 17, 23
United States ex rel. Volpe v. Jordan, 161 F. (2d) 390 (7th Cir., 1947) 19
United States v. Kaplan (D. Conn., Civ. Action 3509, April 29, 1952) 23
United States v. Kornmehl, 89 Fed. 10 (D. C. N. J., 1898) 26
United States v. Knight, 291 Fed. 129 (D. Mont., 1923) (Gov. Br., pp. 18, 33, 37) 17, 21
United States v. Leles, 227 Fed. 189 (N. D. Cal., 1915) (Gov. Br., pp. 12, 18, 33, 38) 17, 21
United States v. Lustig, 110 F. Supp. 806 (S. D. N. Y., 1953) 20
United States v. Matles-Friedman, 115 F. Supp. 261 (S. D. N. Y., 1953) 23
United States v. Minker, October Term, 1955, No. 35 23
United States v. Norsch, 42 Fed. 417 (E. D. Mo., 1890) 28

The word "upon" indicates that the affidavit is the basis of the action.

The use of the expression, to institute proceedings "*upon* affidavit showing good cause therefor" is consistent with a common form of notice of motion which would be used in moving to vacate an order or judgment for fraud. Although the present official forms of notice of motion are stated differently, it is still common in such a well-known district for naturalization matters as the Southern District of New York, to make a motion "upon" an affidavit. In a lengthy proceeding this is a method of designating the papers to be considered in deciding the motion and to be included in the record on appeal.

Attorney General Bonaparte interpreted Section 15 as requiring that the proceeding be based "upon" an affidavit (Gov. Br., p. 59).

The Government asserts, as evidence that the affidavit is not a procedural requirement, that it would be merely duplicitous reaffirmation of the complaint (Br., pp. 8-9, 11-12, 16, 41). This complaint is sufficiently lacking in detail so that an affidavit of good cause clearly need not be a mere duplication of the formal allegations of the complaint (*supra*, pp. 1-2). On the contrary, such an affidavit can be a real protection for the defendant (*infra*, pp. 44-46).

The language of the section authorizing denaturalization actions shows, consistent with the serious nature and consequences of such an action, that an affidavit of good cause is one of the requirements for the commencement of such an action.

PAGE

United States v. Remington, 191 F. (2d) 246 (2nd Cir., 1951), cert. den. 343 U. S. 907 (1952) 45
United States v. Richmond, 17 F. (2d) 28 (3d Cir., 1927) 17, 20, 21, 22
United States v. Salomon, 231 Fed. 928 (5th Cir., 1916) 16, 21
United States v. Schuchhardt, 48 F. Supp. 876 (N. D. Ind., 1943) 18, 22
United States v. Sherrock, 276 Fed. 30, D. Mont., 1921 46
United States v. Smith, 158 U. S. 346, 353 (1895) 12
United States v. Tuteur, 215 F. 2d 415 (5th Cir., 1954) 20
Zurini v. United States, 189 F. 2d 722 (8th Cir., 1951) 23

STATUTES AND RULES

Act of June 29, 1906, 34 Stat. 596, 601:
Section 4 31
Section 15 ..... 4, 5, 6, 9, 10, 13, 14, 15, 16, 18, 20, 22, 25, 28, 29, 31

Federal Rules of Civil Procedure:
Rule 55 (c) 27
Rule 60 (b) 27

Immigration and Nationality Act of 1952, 66 Stat. 163, as amended, 68 Stat. 1232:
Section 340, 8 U. S. C. Sec. 1451 ..... 3, 4, 5, 6, 9, 10, 11, 12, 20, 21, 22, 23, 24

Nationality Act of 1940, 54 Stat. 1137, 1158 ..... 21, 25

MISCELLANEOUS

Brief in *Application of Barnes*, 219 F. (2d) 137 (2d Cir., 1955), filed April 13, 1954 24

Brief in *United States* v. *Minker*, No. 34 October, 1955 Term 24

POINT II

The initial construction of the section, and the weight of authority for over forty years after its enactment, made the affidavit showing good cause a condition precedent to the bringing of a denaturalization action.

Less than a year after the enactment of the Naturalization Act of 1906, the Attorney General interpreted Section 15 as making an affidavit showing good cause a condition precedent to the institution of a denaturalization proceeding. Attorney General Bonaparte stated:

> "The object of the provision undoubtedly is to protect holders of certificates from annoyance and attorneys from unnecessary labor as the result of mere complaints by individuals unable to produce evidence and unwilling to assume the responsibility therefor, as suggested in your letter; but it also seems clear to me that Congress has seen fit to prescribe the method by which this protection to those holding naturalization certificates is to be enforced.
>
> "I am, therefore, of opinion that before any United States attorney is authorized to institute proceedings for the cancellation of a naturalization certificate he should be furnished with a proper affidavit on which the proceedings may be based." (Letter of March 26, 1907, Gov. Br., pp. 50-51).

The Government suggests that this may have been a hasty (and therefore erroneous) opinion by the Attorney General (Br. pp. 30, 31), since it was rendered within eight days after the date of the inquiry. However, this was not the Attorney General's first acquaintance with the statute; and he may well have given thought to the matter over a longer period of time. His letter of March 12, 1907, had asked the Department of Commerce and

PAGE

93 Cong. Globe 4836-38 42
4835, 5118 30
4840 34

40 Cong. Rec. 3640 43
3647, 3648, 3653, 7767-68, 7786 39
7045 38
7762-87 31
7772 40
7785 15
7787, 7869 32
7871, 7874 32

H. R. Doc. 46, 59th Cong., 1st Sess. 15, 29, 31, 39

H. R. Rep. 1365, 82nd Cong., 2nd Sess. 23

H. R. Rep. 1789, 59th Cong., 1st Sess., 5-6 ..... 29, 38

H. R. 12, 52nd Cong., 1st Sess. 39

H. R. 274, 59th Cong., 1st Sess. 43

H. R. 2201, 41st Cong., 2nd Sess. 43, 66

H. R. 8424, 59th Cong., 1st Sess. 43

H. R. 10857, 59th Cong., 1st Sess. 43

H. R. 15442, 59th Cong., 1st Sess:
Section 13 15
Section 17 29

Moore's Federal Practice, 1955, Vol. 7, Ch. 60 26

Opinion of Attorney General Bonaparte of March 26, 1907 ..... 6, 13, 14, 21, 25

Report of Attorney General (1903) 37

Richardson, Messages and Papers of the President 37, 42, 43

Roche, Pre-Statutory Denaturalization, 35 Cornell L. Q. 120 (1949) 30, 36, 38

S. Rept. 1515, 81st Cong., 2d Sess. 28

S. Rep. 4373, 59th Cong., 1st Sess. 32

Labor to furnish "the necessary affidavit." (Gov. Br., p. 47). Assistant Attorney General Milton D. Purdy was Chairman of the three-man Commission on Naturalization and was one of the two commissioners who approved the draft statute which led to the Act of 1906 (H. R. Doc. 46, 59th Cong., 1st Sess.).* The Attorney General's opinion to another cabinet officer, on a matter with which his Department had been familiar from the inception, cannot be dismissed as hasty and ill-considered.

A contemporaneous construction of a statute by the officer charged with its enforcement is entitled to great weight. *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 378 (1931); *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315 (1933). See also, dissenting opinion of Reed, J., in *Bindczyck* v. *Finucane*, 342 U. S. at page 97.

The Attorney General's opinion was cited to support the conclusion that the affidavit was a procedural requirement in an early treatise by a recognized authority on the statute. Van Dyne, *A Treatise on the Law of Naturalization of the United States* 138 (Washington, 1907).

The same interpretation was enforced by the Court of Appeals for the District of Columbia in *Cohen* v. *United States*, 38 App. D. C. 123 (1912). There a defendant had demurred to the complaint, for lack of the affidavit. The court held that the affidavit was "a condition precedent to the exercising of the power conferred" and stated:

> "Congress was not unmindful of the value of a certificate of citizenship, and, in providing the remedy,

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* Mr. Purdy apparently had an active role in the drafting of the the final bill. At one point in the debate a number of technical questions were raised concerning Section 13 of the Committee bill which authorized United States attorneys to appeal from naturalization orders to the circuit courts of appeal. The floor manager of the bill stated that the Assistant Attorney General on the Commission "had in charge" this section. (40 Cong. Rec. 7785)

Supreme Court of the United States

OCTOBER TERM 1955

No. 213

UNITED STATES OF AMERICA,

Petitioner,

v.

ETTORE ZUCCA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF FOR RESPONDENT

Question Presented

May the United States institute proceedings to set aside a final decree granting citizenship without filing an affidavit showing good cause?

Statement

A few facts should be added to those set forth in the Government's brief (pp. 3-5).

Although the complaint sets forth specifically the written documents in which respondent is alleged to have failed to disclose membership in the Communist Party and affiliated organizations (Gov. Br., p. 4), it does not set forth the detailed circumstances which are alleged to have made these documents false.

The complaint charges respondent with having been "a member of the Communist Party of the United States, including the Workers Communist Party and other organizations affiliated with or controlled by the Communist Party of the United States from 1925 to 1947" (R. 3). None of the "other organizations" are specified nor is the manner in which they were "affiliated" or "controlled".

The complaint also states generally that the respondent advocated and participated in the unlawful activities of the organizations described (R. 5), but does not identify any acts of participation. The complaint alleges that respondent did not have the proper intent to qualify for citizenship in various respects (R. 4-5), but does not specify any acts on his part to establish his true state of mind.

The complaint also alleges that "the defendant did not disclose that he was not in a position to establish that he was a person of good moral character during the period required by law, having, among other things, made false statements under oath in his petition for naturalization, as more specifically set forth hereinabove" (R. 4). The "other things" which prevented the defendant from establishing a good moral character are not specified.

The affidavit of verification, by George C. Mantzoros, Assistant United States Attorney, asserted that the complaint was true of his own knowledge, except as to matters alleged on information and belief (R. 6). No part of the complaint is alleged on information and belief (R. 2-6), very likely an inadvertence. When respondent subsequently sought to take depositions of Mantzoros and others, to ascertain the basis for the charges against him, he was met with an affidavit by Mantzoros denying any knowledge and opposing the taking of such depositions,

on the ground that when he verified the complaint he had no personal knowledge of the facts, was not a prospective witness, and had no information except what was obtained from files turned over to him for use in the preparation of the complaint (R. 8).

The Opinion Below

The opinion of Judge Palmieri in the District Court held that the failure of the Government to file an affidavit of good cause deprived the respondent of a protection which Congress had specifically accorded him by Section 340 of the Immigration and Nationality Act of 1952 (8 U. S. C. Sec. 1451). He held that the Act provided an exclusive procedure for denaturalizations, and that the power of United States attorneys to institute civil denaturalization actions was derived from and limited by the Act.

The Court reviewed in detail the history and purpose of the first comprehensive denaturalization statute in 1906, and the contemporary construction of that Act by the then Attorney General (R. 13-14, 16-18). The Court concluded that Congress intended to require that the United States Attorney be furnished with an affidavit of good cause before he could institute proceedings to set aside a final order granting citizenship. The decision was reached after consideration of most of the decisions cited by the Government here, and on the basis of a more thorough analysis of the statute and its legislative history (R. 12-19) than any other case on the subject.

The Court of Appeals for the Second Circuit recognized the thoroughness of Judge Palmieri's analysis and the soundness of his reasoning by unanimously affirming on his opinion (R. 24).

> coupled therewith the condition that an affidavit should be presented to the district attorney, stating the facts necessary to the maintenance of the suit." (p. 126)

In the first case which this Court decided upholding the application of the 1906 Act to certificates of naturalization issued before that date, the Court treated a showing of good cause as essential to the action. In 1912 this Court stated of the Act:

> "It merely provides that, *on good cause shown*, the question whether one who claims the privilege of citizenship under the certificate of a court has procured that certificate through fraud or other illegal contrivance, shall be examined and determined in orderly judicial proceedings."
>
> *Johannessen* v. *United States*, 225 U. S. 227, 242 (1912). (Italics added.)

Although the remark may be "tangential" (Gov. Br., p. 40), it does not lead in the direction of the Government's present argument.

As far as we can determine from the reported cases, the administrative practice initiated by the Attorney General's ruling was followed generally until at least 1940, when the Court of Appeals for the Ninth Circuit announced the opinion in *Schwinn* v. *United States*, 112 F. (2d) 74. Meanwhile, two other Circuit Courts of Appeals had asserted the necessity of the affidavit. In *United States* v. *Salomon*, 231 Fed. 928 (1916), the Fifth Circuit stated:

> "The district attorneys are authorized to institute the proceedings only 'upon affidavit showing good cause therefor' " (p. 929).

The issue there was not the necessity of the affidavit, but the sufficiency of its allegations, the Court holding that no

actionable illegality was shown where the only ground for cancellation appearing from the affidavit was the failure to post notice of the pendency of the petition for naturalization for the required ninety day period. The *Salomon* case was followed in *United States* v. *Richmond*, 17 F. (2d) 28 (3d Cir., 1927). This was a test case involving one of several hundred persons who had been naturalized by the Federal Court for the Eastern District of Pennsylvania. The proceeding to denaturalize was brought eight months later, on the ground that the witnesses had testified only before the Clerk, the Judge being absent in another part of the courthouse. The proceeding was dismissed because the affidavit showed no sufficient ground for relief. See also *Turlej* v. *United States*, 31 F. 2d 696 (8th Cir., 1929) involving the sufficiency of the affidavit "upon which the action is predicated" (p. 697).

Subsequently, in *United States* v. *Hartmann*, 2 F. R. D. 477 (E. D. Pa. 1942), the court described the filing of the affidavit as one "of the material facts averred in the complaint."

Neither the *Schwinn* case, nor the earlier cases which the Government cites as denying the necessity of an affidavit, involved complaints which were filed without supporting affidavits (except the *Knight* case, *infra*).

In the *Schwinn* case the complaint alleged that an affidavit of good cause had been furnished (see Petition for Certiorari, p. 4, n. 1), but no proof concerning the affidavit was offered at the trial.

An affidavit had also been furnished in *United States* v. *Leles*, 227 Fed. 189 (N. D. Cal., 1915) (Gov. Br., pp. 12, 18, 33, 38), which involved the sufficiency of the allegations in the affidavit concerning failure to examine the supporting witnesses in open court at the time of the naturalization. Although no affidavit was furnished in *United States* v. *Knight*, 291 Fed. 129 (D. Mont., 1923) (Gov. Br., pp. 18, 33,

37), which was unsuccessful though undefended, the United States attorney was in possession of a consular certificate.

The Court in the *Schwinn* case adopted the interpretation that Section 15 of the Act of 1906 was "inclusive not exclusive." This apparently meant that there was a general power in the United States Attorney to institute denaturalization proceedings without the specific authority of this section, a view which this Court rejected in *Bindczyck*.

There is a serious flaw in the Government's argument that this Court, in affirming the *Schwinn* case on other grounds (311 U. S. 616, 1940), must have assumed that an affidavit of good cause is not required (Br., p. 35). Since the *Schwinn* complaint recited the existence of such an affidavit, and the defendant had proceeded to trial without raising this objection, there was no jurisdictional issue involved. In the instant case the Court did not treat the affidavit as jurisdictional, for it retained jurisdiction and allowed the Government time in which to file the affidavit (R. 19, 20).

In *United States* v. *Schuchhardt*, 48 F. Supp. 876 (N. D. Ind., 1943) (Gov. Br., pp. 18, 33), after a motion was made because of the absence of a supporting affidavit, the United States attorney furnished defense counsel with a copy of an affidavit by a special agent of the Federal Bureau of Investigation (p. 877). The Court's statement that the affidavit was not a condition precedent was merely dictum, and not necessary to a decision on the other motions which were before the court at the time.

The continuing practice of furnishing affidavits of good cause is illustrated in *Schneiderman* v. *United States*, 320 U. S. 118 (1943), where the complaint set forth that there was attached an affidavit as "required by the provisions of Section 15 of the aforesaid Act of Congress of June 29, 1906" (Trans. of Rec., Vol. I, p. 3). See also the Court's reference to the affidavit at 320 U. S. 159 n. 54.

The authority of the *Schwinn* case was further undermined in *Bindczyck* v. *Finucane*, 342 U. S. 76 (1951), although it was not expressly referred to. In dealing with the question whether a state court could vacate a decree of naturalization, during the term it was issued, without compliance with Section 340, the court held that the provisions of Section 340 were the exclusive method for denaturalizing and stated:

> ". . . we cannot escape the conclusion that in its detailed provisions for revoking a naturalization because of fraud or illegal procurement not appearing on the face of the record, Congress formulated a self-contained, exclusive procedure. With a view to protecting the Government against fraud while safeguarding citizenship from abrogation except by a clearly defined procedure, Congress insisted on the detailed, explicit provisions of § 15." (p. 83)
>
> ". . . if citizenship was granted, it was to be proof against attacks for fraud or illegal procurement based on evidence outside the record, except through the proceedings prescribed in § 15. The congressional scheme, providing carefully for the representation of the Government's interest before the grant of citizenship and a detailed, safeguarded procedure for attacking the decree on evidence of fraud outside the record, covers the whole ground. Every national interest is thereby protected." (p. 84)

The same court which decided the *Schwinn* case, later followed *Bindczyck* in holding that the notice provisions of Section 340 were mandatory because of the exclusive character of that statute. *Stenerman* v. *Brownell*, 204 F. (2d) 336, 340 (9th Cir., 1953). See also: *United States ex rel. Volpe* v. *Jordan*, 161 F. 2d 390 (7th Cir., 1947).

Almost all the cases cited by the Government in support of its present position (Br., p. 18) were decided in 1954

and 1955. We believe that they do not deserve great weight in determining the meaning of the 1906 statute or the present Section 340. In fact, at least one court felt that the reasoning of the *Schwinn* decision had been repudiated in the *Bindczyck* case, but felt obliged to follow the *Schwinn* decision until it was specifically reversed by this Court. *United States* v. *Lustig*, 110 F. Supp. 806 (S. D. N. Y. 1953).

The recent cases which the Government cites (Br., p. 18) are all district court cases except *United States* v. *Tuteur*, 215 F. 2d 415 (7th Cir., 1954). The *Tuteur* decision was dictum, since the Court reversed the summary judgment granted by the District Court, and need not have considered the necessity of an affidavit. The Court simply cited the *Schwinn* case, without reviewing the history of the statute or the effect of the *Bindczyck* case.

None of the cases which are cited by the Government analyzes the statute or the legislative history as fully as did Judge Palmieri below.

The requirement of an affidavit is not a mere technicality. Serious consequences fall upon a naturalized citizen from the mere commencement of denaturalization proceedings. The attack on his status becomes a matter of public record, open to use by his union adversaries or business competitors. He must submit to elaborate pretrial examination into his political beliefs and his moral character, unless he is in a position to claim the privlege against self-incrimination. Where broad issues are involved, such as whether particular organizations are "affiliated with or controlled by the Communist Party", a defendant may be forced to great expense to hire counsel and investigators. The general respect which was given to the requirement of an affidavit by courts and administrative officers at the time the statute was enacted, and for decades thereafter, shows that Congress recognized the importance of citizenship and intended that a person once

admitted to American citizenship should not be subject to legal proceedings to defend his citizenship without a preliminary showing of good cause.

POINT III

The *Schwinn* decision was not adopted by Congress in subsequent reenactments of the Naturalization Act.

At the time the Nationality Act of 1940 was adopted the weight of authority regarded the affidavit showing good cause as a necessary prerequisite for instituting denaturalization proceedings. Besides the contemporaneous construction of the statute by Attorney General Bonaparte (*supra*, p. 14) and the statement of this Court in *Johannessen* v. *United States* (*supra*, p. 16),* there were decisions by courts of appeal in three circuits approving judgments for defendants because of the Government's failure to file a sufficient affidavit. *Cohen* v. *United States*, 38 App. D. C. 123 (D. C. Cir., 1912); *United States* v. *Salomon*, 231 Fed. 928 (5th Cir., 1916); *United States* v. *Richmond*, 17 F. (2d) 28 (3d Cir., 1927). As against this, there were contrary decisions in one circuit. *Schwinn* v. *United States*, 112 Fed. (2d) 74 (9th Cir., 1940); *United States* v. *Knight*, 291 Fed. 129 (D. Mont., 1923), aff'd 299 Fed. 571 (1924); *United States* v. *Leles*, 227 Fed. 189 (N. D. Cal., 1915). Moreover, none of the contrary cases in the Ninth Circuit involved a square holding (see pp. 17-18, *supra*).

At the time of the 1940 reenactment, therefore, three out of four circuits dealing with the question had held that an affidavit was mandatory, and there were similar statements by this Court and the Attorney General of the United States.

When the denaturalization provision was reenacted in the Immigration and Nationality Act of 1952 the conflict

* An affidavit of the defendant was made part of the Government's petition (225 U. S., at p. 33).

in interpretation had still not been resolved by this Court. However, there were clear indications that the *Schwinn* case was not a reliable precedent. The complaint in so celebrated a case as *Schneiderman* v. *United States*, 320 U. S. 118 (1943), had attached an affidavit (see p. 18, *supra*), and United States attorneys continued to file affidavits in a number of cases (see p. 23, *infra*). There were only two decisions in district court which followed the *Schwinn* case (*e. g., United States* v. *Schuchhardt*, 48 Fed. Supp. 876, N. D. Ind. 1943; *United States* v. *Favorito*, 7 F. R. D. 152, N. D. Ohio, 1945). More recently this Court in *Bindczyck* v. *Finucane*, 342 U. S. 76 (1951), had repudiated the reasoning of the *Schwinn* case by its holding that Section 15 of the Act of 1906 was intended to provide an exclusive procedure in denaturalization cases.

The hearings, reports and debates in connection with the 1952 Act do not indicate that the difference in interpretation of the affidavit provision was called to the attention of Congress. Although there is a considerable discussion of the judicial interpretations of the Nationality Act in the Senate Judiciary Committee report of its investigation of the immigration system (S. Rept. 1515, 81st Cong., 2d Sess.), there is no mention of any decision relied upon by the Government. There are, however, two references (pp. 761, 765) to *United States* v. *Richmond*, 17 F. (2d) 28 (3rd Cir., 1927), which held that the affidavit was mandatory.

Furthermore there were indications that Congress regarded Section 15 (now 340) as a grant of power and not as a method of inducing United States attorneys to act. Congress chose to amend that section when it added additional grounds for revocation of citizenship in the Immigration and Nationality Act of 1952. The House Judiciary Committee Report on the change stated:

> "One of the major changes in the existing nationality law provided by the bill is contained in

Section 340 which authorizes judicial revocation of naturalization. Under the provisions of Section 338 of the Nationality Act of 1940, revocation is possible where the naturalization was obtained by fraud or procured illegally.

"The bill changed the basis for judicial revocation of naturalization from fraud and illegal procurement to procurement by concealment of a material fact or by wilful misrepresentation." (H. R. Rep. 1365, 82nd Cong., 2nd Sess., p. 23)

Congress apparently specifically considered the *Bindczyck* case. Section 340(j) of the Act of 1952 appears to be designed to abrogate the rule that a State court could not reopen an original naturalization proceeding under local rules of practice. However, the basic rationale of the *Bindczyck* case, that Section 340 prescribes and defines the denaturalization power and establishes the procedural conditions for its exercise, is not challenged as respects independent proceedings.

The administrative practice with respect to furnishing affidavits has not been consistent (Petition for Certiorari, p. 8). The opinions in a number of cases after 1940 indicate that affidavits were filed. *United States* v. *Hartmann*, 2 F. D. R. 477 (E. D. Pa., 1942); *Zurini* v. *United States*, 189 F. 2d 722 (8th Cir., 1951); *United States* v. *Kaplan*, unreported, D. Conn. Civ. Action 3509, April 29, 1952). Even after the Act of 1952, affidavits were filed. See, *e. g.*, *United States* v. *Matles-Friedman*, 115 F. Supp. 261, (E. D. N. Y., 1953); *United States* v. *Brown*, unreported, E. D. Mich. Civ. No. 12628, Feb. 15, 1955. The rarity of reported cases in which no affidavits were furnished prior to 1952 points to the belief that affidavits were furnished in a majority of instances until recent years.

In 1954 a brief was filed in the Court of Appeals for the Second Circuit by the United States Attorney for the

Northern District of New York stating as follows:

> "Although revocation proceedings are instituted by United States Attorneys, such actions must be based 'upon affidavit showing good cause therefor'. United States Attorneys do not conduct investigations and the 'good cause' must be supplied by some other agency." (*Application of Barnes*, 219 F. (2d) 137, Brief filed April 13, 1954.)*

Evidence of clear administrative recognition of the necessity for an affidavit of good cause is found in a case presently pending in this Court (*United States* v. *Minker*, October Term, 1955, No. 35). The petition in that case presented the question whether an immigration officer may subpoena a naturalized citizen "in the course of an administrative investigation to determine whether good cause exists for the institution of denaturalization proceedings" (p. 2). The brief on the merits, although doubtless prepared with knowledge of its interrelation to the present case, recognizes that a denaturalization proceeding should be preceded by an ascertainment whether "good cause" exists. The practice, as described in the brief, is for the District Director of Immigration and Naturalization to authorize an investigation if information submitted to the Service indicates a *prima facie* showing that grounds for revocation exists. Following a full field examination, the District Director reports the facts in writing to the Commissioner, who sends it to General Counsel of the Service for study. There, if sufficient grounds are shown, an "affidavit showing good cause" is prepared and executed, and is forwarded as an aid to the formal judicial proceedings which may be brought

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* This case is pending before this Court on writ of certiorari *sub nom. Falcone* v. *Barnes*, No. 47. See also *Lansky, et al.* v. *Saxoretti*, 220 F. 2d 906 (5th Cir., 1955) pending on petition for certiorari, No. 100.

in the district where the naturalized citizen resides "at the time of bringing suit" (p. 34). The brief describes the Immigration and Naturalization Service as known by Congress to be the investigative arm of the Attorney General "to determine whether there exists the 'good cause' which requires that an action for revocation be brought" (p. 22).

As against these indications of substantial administrative compliance with Attorney General Bonaparte's opinion, there is apparently no instance in which the contrary interpretation was relied on by delivering an "outsider" affidavit to a reluctant United States attorney.

If, therefore, Congress may be said to have approved any construction of the statute by reenactment, the weight of authority indicates that it approved the contemporary interpretation of the Attorney General. In any event, the doctrine of Congressional approval by reenactment gives no support to the Government's argument, in the absence of a single authoritative interpretation which was called to the attention of Congress and expressly dealt with. This Court had before it a similar contention with respect to the Nationality Act of 1940 in *Girouard* v. *United States*, 328 U. S. 61 (1946). In that case it was held that an authoritative construction of the nationality laws adopted in three separate decisions of this Court was not approved by Congress in the 1940 Act despite the fact that the rule of these cases had repeatedly been called to the attention of Congress and many bills designed to overturn that rule had been introduced. See also: *Commissioner* v. *Sternberger's Estate*, 348 U. S. 187, 206 (1955). As was pointed out by the Court in *United States* v. *Candela*, 131 F. Supp. 249 (S. D. N. Y., 1954) "to adopt (the *Schwinn*) decision all Congress need have done is delete six words" (p. 251).

The history of Section 15 demonstrates that if the affidavit showing good cause does not serve the purpose of

protecting naturalized citizens against unfounded proceedings, it serves no purpose. The mere retention of the clause is an indication that the affidavit is regarded as a prerequisite for institution of proceedings.

POINT IV

The legislative history confirms that Congress intended to require an affidavit showing good cause as a necessary preliminary step to the institution of denaturalization proceedings.

The legal background indicates that Congress' purpose in 1906 was to provide a uniform procedure for naturalization and denaturalization.

Under the equity practice before 1906, denaturalization proceedings could be brought in one of two ways. The first way was to apply to the court which had granted the naturalization decree to vacate its judgment and receive additional testimony bearing upon the fitness of the applicant for citizenship. See e. g. *United States* v. *Kornmehl*, 89 Fed. 10 (D. C. N. J., 1898). Such a motion might be based upon fraud, mistake, newly discovered evidence or other ground. It would not be granted *pro forma*, however, and would of necessity be based upon a showing of good cause for going behind the outstanding judgment.

Roughly comparable to such motions were certain ancillary equitable remedies available only in the naturalization court, notably the bill of review.*

A bill of review could not be filed, however, without obtaining leave of the trial court or, if there was an appeal, of the appellate court. *Obear-Nester Glass Co.* v. *Hartford*

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* For a general discussion of the ancient procedures for relief from a judgment or order see Moore's Federal Practice, 1955, Vol. 7, Ch. 60.

Empire Co., 61 F. 2d 31, 34 (8th Cir., 1932). To obtain leave it was necessary to make a preliminary showing of merit.

See e. g. *Hazel-Atlas Co.* v. *Hartford Co.*, 322 U. S. 238, 248 (1944), where this court stated of a petition for leave to file a bill of review:

> "The petition must contain the necessary averments, supported by affidavits or other acceptable evidence;"

Modern analogies to this practice may be found in the Rules of Civil Procedure. Rule 55 (c) provides that the Court may set aside an entry of default "for good cause shown". A judgment after contest may be set aside for fraud on motion pursuant to Rule 60 (b). A motion under Rule 60 (b) would normally be based upon affidavits showing good cause.

There were at least two difficulties to this pre-1906 procedure. One was that many of the fraudulent naturalization proceedings appear to have occurred in certain State courts and involved at least laxness on the part of some court officers. Therefore the forum might not be advantageous. Furthermore there were many vagaries and uncertainties in this procedure in State courts. See: Appendix, *Bindczyck* v. *Finucane*, 342 U. S. at page 88.

An alternative denaturalization procedure before 1906 was to bring an independent action in equity. Such a proceeding would not operate against the judgment, which was in legal fiction unassailable, but against the person. It would require the defendant to surrender his certificate and forbid him from asserting rights under the judgment because he obtained it by fraud upon the court. Cf. Rule 60 (b) of Civil Procedure, which preserves the bill in equity procedure for other kinds of judgments. This highly artificial procedure was, however, sharply restricted in its scope. By 1906 there were growing indications that the independent bill was not a practicable denaturalization procedure.

In *United States* v. *Norsch*, 42 Fed. 417 (E. D. Mo., 1890), the Court stated, *obiter*, that a Federal court could entertain proceeding against a state court judgment obtained by false testimony, but it was held that procedural irregularities in the naturalization court could not thus be inquired into by a proceeding in a different court. The fact that the naturalization court (the St. Louis Court of Criminal Correction) probably had no power to set aside its own order or to entertain a bill of review was thought not to require a different result. In *United States* v. *Gleason*, 78 Fed. 396 (E. D. N. Y., 1897), aff'd *sub nom*, *United States* v. *Gleeson*, 90 Fed 778 (2nd Cir. 1898), it was held that where the judgment was regular on its face, an independent proceeding could not be entertained to set it aside for false testimony. These cases taken together seriously impaired the possibility of independent action and forced the filing of denaturalization proceedings in the very courts which were responsible for the worst abuses. Moreover, even if proceedings could be entertained in the Federal courts, it has never been clear to what extent those courts would entertain proceedings to cancel citizenship for intrinsic fraud such as perjured testimony, without express statutory authority. In *Johannessen* v. *United States*, 225 U. S. 227 (1912), this Court considered the scope of the denaturalization power as it existed prior to the Act of 1906 and left this question open. "The extent of general Federal power to denaturalize was, prior to . . . [1906], a matter of considerable legal controversy." (S. Rep. 1515, 81st Cong. 2d Sess., p. 754.)

Denaturalization proceedings continued to be brought, in spite of these obstacles (see pp. 36-38, *infra*), but there was obviously need to clarify the source of the Court's power.

The predominant intent of Congress in Section 15 of the Act of 1906 was not to stimulate United States attorneys to act (see pp. 36-41, *infra*), but to establish a single

reliable and carefully safeguarded procedure for instituting denaturalization proceedings in the Federal courts which would not be subject to the vagaries of State and Federal rules on reopening judgments. In authorizing this procedure Congress took care to preserve the common requirement of a preliminary showing of good cause.

The requirement of an affidavit was first inserted in the statute as a qualification on the power to denaturalize, and not as a means of forcing the United States attorney to act.

The first draft of the Act of 1906 was prepared by the Commission on Naturalization appointed by President Theodore Roosevelt. This draft provided:

> "Sec. 34. The United States shall have the power to institute proceedings . . . for the purpose of setting aside and canceling the certificate of citizenship. . . ." (H. R. Doc. No. 46, 59th Cong., 1st Sess., App. F., 106).

This draft was revised in the House Committee on Immigration and Naturalization. The bill reported to the House with the Committee's approval provided:

> ". . . the United States shall, *upon affidavit made by any credible person*, have the power to institute proceedings . . . for the purpose of setting aside and canceling the certificate of citizenship. . . ." (H. R. 15442, 59th Cong., 1st Sess., Sec. 17, bill dated Feb. 26, 1906) (Italics added)

The committee reported that under the bill, "Power is given to the United States, upon affidavit of any credible person, to institute proceedings . . ." (H. R. Rep. 1789, 59th Cong., 1st Sess., 5-6)

The argument that the House Committee regarded the affidavit clause as a step in the direction of compelling the United States attorney to act (Gov. Br., p. 28) is based entirely upon hypothesis and ignores language which is unambiguous.

The words "affidavit made by any credible person" added in Committee are similar to the words "affidavit of a credible person" in a bill which had been defeated 35 years prior (93 Cong. Globe 4835). The language of the earlier bill confirms that the Congress did not lack the skill to draft a statute requiring United States attorneys to proceed when it wished to do so. The House Committee draft clearly indicates that whether or not the members were familiar with the earlier bill, they repudiated the idea of private complaints and regarded the affidavit as a limitation on the power of the United States to institute denaturalization proceedings.

It is incorrect that the 1870 bill "died an entirely unrecorded death" in the argument that ensued when Senator Sumner introduced an amendment to naturalize Negroes and orientals. *Roche, Pre-Statutory Denaturalization*, 35 Cornell L. Q. 120, 129 (1949) (quoted in Gov. Br., p. 24). The Sumner amendment was defeated and the Senate bill was voted down by a vote of 33 to 17 (93 Cong. Globe 5123). The overwhelming opposition to the bill stemmed in part from the easy denaturalization procedure it authorized. Senator Schurz described it as making a naturalization paper like "a vial of nitroglycerine in one's pocket that might explode at any moment * * *" (93 Cong. Globe 5118).

It is not necessary, however, to refer to this old bill to obtain an explanation for the reference to an "affidavit made by any credible person." Prior to the 1906 Act the naturalization statutes required that a petitioner prove five years residence by the oath of citizens of the United States

(1878 Revised Statutes, Section 2165). The Act of 1906 elaborated this requirement, providing that the naturalization petition,

> "*be verified by the affidavits of at least two credible witnesses,* who are citizens of the United States, and who shall state in their affidavits that they have personally known the applicant to be a resident of the United States for a period of at least five years continuously, and of the State, territory or district in which the application is made for a period of at least one year immediately preceding the date of the filing of his petition, and that they each have personal knowledge that the petitioner is a person of good moral character, and that he is in every way qualified, in their opinion, to be admitted as a citizen of the United States." (Sec. 4, Par. second; Italics added)

This provision was taken without significant change from Section 17 of the draft bill recommended by the Commission on Naturalization (H. Doc. 46, 59th Cong., 1st Sess. pp. 98-99).

The apparent explanation of the reference to an "affidavit made by any credible person" in Section 15 was that the Committee believed that the requirements for verification of a denaturalization petition should be no less strict than those for verification of the naturalization petition. Congress, therefore, required that the Court be furnished with the affidavit of a person having personal knowledge of the facts with respect to the defendant's alleged fraud or illegal procurement before it would entertain denaturalization proceedings.

On the House floor the bill was attacked strongly section by section in Committee of the Whole as imposing undue hardships on aliens and naturalized citizens (40 Cong. Rec. 7762-87).

Finally the attacks on Section 13 motivated Mr. Bonynge, the floor manager, to ask that the section be passed over without prejudice and then that the debate be adjourned (40 Cong. Rec. 7787).

When the bill was called up again, a series of moderating amendments were offered by Congressman Bonynge, apparently by agreement with the bill's opponents. He then moved that the Committee be discharged and a vote taken on the amended bill (40 Cong. Rec. 7869).

There were three amendments to Section 15:

1. The venue was restricted to the residence district of the naturalized citizen.*

2. The language "the United States shall . . . have the power" was changed to "it shall be the duty of the United States district attorneys . . ."

3. The phrase "affidavit showing good cause" was substituted for "affidavit made by any credible person" (40 Cong. Rec. 7871, 7874).

The purpose of the venue amendment was explained clearly by Congressman Bonynge, but the only explanation of the other two changes was his statement that United States attorneys already had the power to institute denaturalization proceedings under federal court decisions (40 Cong. Rec. 7874). However, the context of his remarks shows that he did not consider that he was changing the affidavit of good cause from a qualifiying requirement to a mere instrument of compelling action by a reluctant district attorney.

The most reasonable explanation of the change of language from power to duty supports the construction

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* The Government brief is not correct in stating that the favorable venue provision was added before the reference to an affidavit of "any credible person" (p. 28).

adopted below. Since the United States already claimed the power to bring denaturalization proceedings (*supra*, pp. 26-28), the bill as reported might not assure that United States attorneys would follow the procedural requirements of the new section. In form the bill would simply confer additional power subject to compliance with the new procedural restrictions, and United States attorneys might still attempt to proceed under the asserted old powers and procedures. To assure compliance with the new procedure in all cases, the statute was amended to read, "* * * it shall be the duty of the United States attorneys," etc. What had formerly been a qualification on the grant of power (i. e. the furnishing of an affidavit) now was expressed as a duty of the United States attorney, but the basic intent of the bill was unchanged. Since the bill contemplated that the affidavit would be delivered to the court by the United States attorney and not by an outsider, the words "affidavit made by any credible person" were inappropriate and were changed to "affidavit showing good cause."

It is significant also that the change from words of "power" to "duty" coincided with a change from the Government itself to an agent of the Government. The language of the bill had read, "The United States shall * * * have the power to institute proceedings." The specification that the Government should act through the United States attorney was a step in the direction of clarifying and tightening the wording of the Act. In referring to a particular officer of the Government, it was more natural to use the word "duty" than "power," but the change in language signifies no change in the importance of the affidavit.

The modified language also evidences an intent that the court shall pass upon the sufficiency of the affidavit as showing good cause, since under the abandoned language it might be argued that the unsupported conclusions of

"any credible person" were sufficient. The 1870 proposal for an affidavit of a "credible person" had been criticized in these words:

> "A man who may have been naturalized for any period of time may upon the oath of anyone, however degraded, who only expresses his belief, be called up by an order of the judge, under the suggestion of the District Attorney, and if he fails to appear may be punished by fine and imprisonment!" (Comment by Senator Vickers, 41st Cong. 2d Sess., 93 Cong. Globe 4840).

The requirement that the affidavit show "good cause" apparently was a concession to criticism of this sort.

The Government can not fairly argue that these last minute modifications of wording, passed off by the floor manager as purely technical, represent a sudden major change in the purpose of the provision. Therefore, it seeks to interpret the clear language of the bill reported favorably by the House Committee, i. e. "The United States shall, upon affidavit made by any credible person, have the power * * *" as a "gingerly and reluctant" step toward private complaints (Br., p. 28).

The Brief then goes further and hypothesizes that the change to language of duty was made by Mr. Howells on pressure of supporters of private denaturalization, like Representatives Jenkins, Hayes, and Waldo (Br., pp. 28-29). Actually the change was not made by Mr. Howells. It was made in an amendment on the floor moved by Mr. Bonynge in response to the pressure of opponents of the bill (*supra*, p. 32). The Senate Committee, in reporting the bill in its amended form, reprinted without comment the description of the bill as a conferral of power upon the filing of an affidavit (S. Rep. 4373, 59th Cong., 1st Sess., 4).

The words "probable cause" had appeared in at least one naturalization case before that date. *In re Coleman*, 15 Blatchf. 406, 6 Fed. Cas. No. 2980 (C. C. S. D. N. Y., 1879) involved a habeas corpus proceeding to review the arrest of a naturalized citizen under a warrant charging him with illegally attempting to vote in reliance on a certificate of citizenship which he knew to be invalid. The petitioner was one of some 18,000 who had been naturalized in the Superior Court of New York in October 1868. This prosecution apparently was a test case brought as a criminal matter to escape the jurisdiction of the State Court. In view of its connection with the notorious naturalization scandal of 1868, it is logical to assume that the decision attracted wide attention. Circuit Judge Blatchford, in a long opinion, treated the Sixth Amendment as entitling the petitioner to notice of the nature and cause of his charge, described the Superior Court action as an adequate record of naturalization, and stated concerning the affidavit in support of the warrant of arrest "No 'probable cause' was set forth in the affidavit" (6 Fed. Cas. at p. 54).

Whether or not Congress had the *Coleman* case in mind when it enacted the statute of 1906, it constitutes judicial recognition of the importance of an affidavit of probable cause in a closely analagous situation.

Judge Palmieri, in the District Court opinion in this case, summarized the effect of the floor action on the provisions of Section 15 of the Act of 1906 by saying:

> "The fact that Congress inserted these requirements for the protection of naturalized citizens in the 1906 Act is inconsistent with the Government's position. It indicates that in enacting Section 15 of that Act Congress did intend to limit the theretofore exercised power of United States Attorneys to institute civil denaturalization actions" (R. 14).

There is no showing that United States attorneys were lax in bringing denaturalization actions before 1906.

We have discovered no suggestion whatever throughout the voluminous debates and reports on naturalization legislation, that the United States attorneys were lax in bringing denaturalization proceedings. The debates on naturalization matters were often heated. It is unreasonable to assume that a provision intended to force United States attorneys to act on citizen complaint could be enacted without a single expression criticizing United States attorneys for laxness. Nor is it likely that the well-established rule against private complaints (see Gov. Br., p. 24) would be overturned without a word of explanation or protest. Such evidence as is available indicates, in fact, that Congress was concerned with excessive zeal on the part of the United States attorneys. As an historical matter, naturalization legislation was sought primarily by Republicans because loose naturalizations on the eve of elections were thought to benefit primarily the big-city machines of the Democratic Party. A strong impetus toward legislation began with the election of 1868, in which it was claimed that the State of New York was lost to the Republican Party through the naturalization in State courts of tens of thousand of aliens in the City of New York. See: Roche, *Pre-statutory Denaturalization*, 35 Cornell L. Q. 120, 126-7 (1949). At this time and throughout most of the period until 1906 the Republican party controlled Federal appointments and the United States attorneys were zealous in denaturalization measures. According to one commentator, about 2,000 persons holding 1868 certificates were denaturalized in New York City in 1878, many through illegal seizure of certificates by the United States attorney. *Id.* pp. 131-132. It appears that that officer contended that *all* the 1868 certificates of citizenship were invalid and attempted to prevent the

holders of such certificates from voting in the 1878 elections by delivering an "official" warning to them at the registration places that they "could avoid arrest and prosecution" by surrendering their certificates by November 1. See: *In re Coleman*, 15 Blatchf. 406, 410; 6 Fed. Cas. No. 2,980 (S. D. N. Y., 1879).

Statements from members of the Executive Department confirm the continued activity in denaturalization. President Benjamin Harrison stated in his Second Annual Message in 1890 that:

> "The vacation by judicial decree of fraudulent certificates of naturalization, upon bills in equity filed by the Attorney General in the circuit court of the United States, is a new application of the familiar equity jurisdiction. Over one hundred such decrees have been taken during the years. * * *" (Richardson, *Messages and Papers of the Presidents*, Vol. 9, p. 116)

Revocation proceedings were often commenced for political expediency. Upon occasion naturalized persons found to be members of the wrong party were promptly denaturalized. The Report of Special Examiner Van Deusen in 1903, although primarily concerned with naturalization frauds, stated the following with respect to irregular denaturalizations:

> "In another case, a judge entered an order revoking certificates of citizenship granted to seven aliens by him, under the impression that they had been sent by his political organization, but were afterwards repudiated by that organization. The order recited, as a reason for the revocation, the fact that the fees had not been paid." (1903 Rep. Atty. Gen. 394)

The United States District Attorney in California attempted to revoke nine citizenship orders in an *ex parte*

proceeding on oral motion, purporting to be made in the course of the original proceedings, some three years after the orders admitting to citizenship. See, *Tinn* v. *United States District Attorney*, 148 Cal. 773, 84 P. 152 (1906). See also 40 Cong. Rec. 7045, where it was stated that 204 certificates were turned in within thirty days when the United States District Attorney in San Francisco announced that he would not prosecute holders of fraudulent certificates who surrendered their certificates. See, *Bindczyck* v. *Finucane*, 342 U. S. 76, n. p. 82.

The immediate impetus for the studies culminating in the Act of 1906 was the St. Louis naturalization frauds of 1902. A description of some of the naturalization abuses which then occurred appears in *Dolan* v. *United States*, 133 Fed. 440 (8th Cir., 1904). Here again it appeared that the frauds implicated Democratic Party workers and involved State court naturalization practices. The United States Attorney was vigorous in prosecuting offenders through a grand jury investigation commencing in January of 1903.

In a little over two years time between 1903 and 1905, United States district attorneys succeeded in cancelling 1916 certificates of citizenship in civil proceedings and obtained 865 criminal convictions (H. R. Rep. 1789, 59 Cong., 1st Sess. 2). It appears that many of the civil proceedings were conducted in the City of New York despite the ruling in *United States* v. *Gleason*, 78 Fed. 396, that perjury was not a ground for revocation of citizenship. The methods that were used remain somewhat of a mystery, because of the adverse opinions in reported cases and the absence of court records of these proceedings. See Roche, *Pre-Statutory Denaturalization*, 35 Cornell L. Q. 120, 132.

The Government (Br., p. 21) mentions, as evidence that United States attorneys might be indisposed to vigorous

action, a complaint by the Commission on Naturalization that "the requirement for supervision by federal and state prosecuting attorneys would work irregularly." Read in its proper context, the Commission is shown to have been expressing concern not about *federal* attorneys, but about state prosecuting attorneys, in state court proceedings; moreover, it was referring to *naturalization* proceedings (and not denaturalization proceeding). The portion of the report quoted by the Government (H. Doc. 46, 59th Cong., 1st Sess. 27) referred to a bill introduced in the 52nd Congress, First Session (H. R. No. 12), providing that when an alien's petition for naturalization was filed, the Clerk of the Court was to report the fact to the United States attorney or the state's attorney as the case might be, to appear and defend the United States. The Commission was arguing for national supervision of naturalization. Its remarks have no bearing on any supposed unwillingness of United States attorneys to bring denaturalization proceedings.

At various times in the House debate, there was discussion of registration frauds (40 Cong. Rec. 3647), false certification of expenses by judges (Id., 3648), and sale of forged naturalization certificates by United States consuls (Id., 3653). The report of the Commission on Naturalization refers to "the shameless influences which have brought so many State courts into disrepute so far as the matter of conferring citizenship is concerned", and to many State judges as permitting the law "to be degraded into an instrument of fraud and political corruption" (H. Doc. 46, 59th Cong., 1st Sess., pp. 19-20, 21). Furthermore, there were suggestions that partisan United States attorneys might take appeals *in naturalization cases* to delay qualification of the petitioners for voting (40 Cong. Rec. 7767-68, 7786). Despite the freedom of the debate there appears no suggestion that it was necessary to force partisan or reluctant United States attorneys to bring denaturalization proceedings.

The only other evidence which the Government cites concerning "the suspicion as to United States attorneys" (Br., p. 21) relates to the section concerning appeals from an original grant of citizenship. The reference to an astute district attorney taking an appeal in naturalization cases in order to affect the election in favor of his side, read in its true context, follows a statement by Representative Mann in support of a proposed amendment to limit the 90 day waiting period before final action in naturalization cases to a period of 30 days. He feared undue diligence, rather than laxity. Representative Mann stated: "I think the observation and experience of almost every Member of the House is that where it is made a duty of the Government, or the Government is given a right to do a thing, it is the duty, and the Government does it." 40 Cong. Rec. 7767.

Against the background of partisan zeal of United States attorneys in confiscating naturalization certificates without judicial proceedings, and seeking to revoke citizenship by *ex parte* applications (pp. 36-38, *supra*), the Court's language in *Bindczyck* has direct relevance:

> "But Congress was not content to devise measures against fraud in procuring naturalizations only. In § 15 of the Act of 1906 it formulated a *carefully safeguarded method for denaturalization.* Though the principal criticism leading to the enactment concerned the evils inherent in widely diverse naturalization procedures, experience was not wanting of the *dangers and hardships attendant on haphazard denaturalization.*" (pp. 81-2; Italics added.)

This was the matter with which Congress was concerned: It knew that, "[a]liens coming to this country . . . as a general rule, are without money to spend . . . In the main, they are ignorant of our language and of our laws . . ." (40 Cong. Rec. 7772). It wanted to protect such persons

against default and consent judgments obtained wholesale without proper notice and in inconvenient forums. See, dissenting opinion of Justice Reed in *Bindczyck* v. *Finucane*, 342 U. S. at page 94. The unusual notice and venue provisions are intended to make it easier for such persons to appear and defend themselves. The affidavit requirement is intended to assure that denaturalization proceedings will not be commenced upon suspicion and surmise and to assure that whether or not the defendant appears the court will be presented with sworn testimony sufficient to justify revocation of citizenship. The affidavit, notice, and venue provisions are all parts of a single system of safeguards which Congress insisted upon as a condition to the broad grant of authority it conferred.

Section 15 did not represent a "compromise" with "demands" for bills permitting private citizens to institute denaturalization proceedings.

The Government asserts that there was a widespread "demand" for legislation to permit denaturalizations at the suit of private citizens (Br., p. 27), and that the section, as enacted, represented a "compromise" with these bills (Br., p. 20).

A careful study has been made of the legislative history of the 1906, 1940 and 1952 acts, the reports, opinions, and correspondence of the Attorney General, the annual messages of the Presidents of the United States, and treatises and articles. Professor Oscar Handlin of the Department of History of Harvard University, as a consultant to respondent's counsel, has also examined the correspondence of President Theodore Roosevelt, the reports of the Commissioners of Immigration, newspapers and occasional papers of some of the members of the House of Representatives and the Senate. No trace has been found of any "demand" to give citizens a means of forcing district attorneys to exercise their powers.

The efforts to obtain legislation in 1870 were inspired by the mass naturalizations in New York City in 1868, which we have seen were vigorously attacked by the United States Attorney. The House bill as originally reported contained no provision for revocation of citizenship and simply imposed criminal penalties upon conviction of specified offenses against the naturalization laws (H. R. 2201, 41st Cong., 2d Sess., 93 Cong., Globe 4366). The Senate Judiciary Committee amended the bill, and substituted a completely new measure with provisions for revocation of citizenship. The bill was not enacted. The discussion on the floor of the Senate centered on charges that it was an unfair Republican Party measure, intended to maintain the Republican majority by making naturalization difficult and denaturalization easy (93 Cong., Globe 4836-8). The only comments with respect to the denaturalization provision were adverse. See the statements of Senator Vickers and Senator Schurz, *supra*, pp. 30, 34.

It was not the laxity of the Executive Department which was impeding denaturalizations; it was the solicitude of Congress for the interests of the thousands of naturalized citizens who held certificates which might be subject to attack.

Messages of the Presidents continued to urge action for denaturalization. For instance, President Grant in 1876, referred to the need for more effective procedural remedies against naturalization frauds:

> "Such a fraud being discovered, however, there is no practical means within the control of the Government by which the record of naturalization can be vacated;— The feeling became so great and of such frequent occurrence that I cannot too earnestly recommend that some effective measures be adopted to provide a proper remedy and means for the vacating of any record thus fraudulently made; * * *" *Eighth Annual Message*, 1876; Richardson, *Messages and Papers of the Presidents*.

See also:

Ulysses S. Grant, *Sixth Annual Message*, 1874; *Seventh Annual Message*, 1875;
Chester A. Arthur, *Fourth Annual Message*, 1884;
Grover Cleveland, *First Annual Message*, 1885;
Theodore Roosevelt, *Third Annual Message*, 1903; *Fourth Annual Message*, 1904; *Fifth Annual Message*, 1905.

There is no support for the statement in the Government's brief that "more immediately prior to the instant 1906 enactment, interest in the problem revived and a marked demand developed for a means of assuring denaturalization proceedings when the United States attorney might be indifferent" (p. 24). Such a demand did not exist, for the United States attorneys were acting to revoke citizenship, but in proceedings of uncertain validity and not surrounded by safeguards commensurate with the importance of the loss of right involved.

The Government, in its brief (p. 25), concedes that the Commission on Naturalization did not participate "in the demand for a means of forcing denaturalization actions". In fact, when H. R. 15442 was reported to the House it was reported that the bill "is in a large measure based upon the drafts of the bill prepared by that Commission", 40 Cong. Rec. 3640.

An affidavit of probable cause is not comparable to a provision for action by individual citizens. The Committee on Immigration and Naturalization specifically considered the bills authorizing denaturalization "on petition • • • by any citizen" (H. R. 274, 8424, 10837), and rejected any such reference.

The legislative history shows a Congressional purpose to safeguard the rights of defendants in denaturalization proceedings, and that the affidavit showing good cause is a procedural safeguard, comparable to the requirements of venue in the district of residence and notice of 60 days.

POINT V

The affidavit showing good cause constitutes a reasonable precaution for the protection of naturalized citizens.

The decision below will not place any serious burden on the United States attorneys. They are presently furnished, in ordinary course, with affidavits prepared by the Immigration and Naturalization Service, showing whether good cause for denaturalization exists (*supra*, pp. 24-25). The very preparation of these affidavits represents a recognition of the meaning of the provision that denaturalization action shall be brought "upon affidavit showing good cause".

The discovery provisions of the Federal Rules of Civil Procedure are applicable to denaturalization proceedings. Disclosure of the Government's case must be made before trial in any event, and the decision below merely requires it to be made at the outset. In this manner it permits the defendant, before facing a full trial of the issues, to obtain a preliminary determination whether the evidence disclosed by the affidavits on which the proceeding is based constitutes adequate ground for denaturalization if proved. This procedure will protect naturalized citizens from the harassment and expense of litigation in cases where an adequate preliminary showing cannot be made. Serious harm can result to a union officer, a business man, a member of a profession, or indeed, any citizen, from official charges of fraud. This harm will not always be corrected by a later acquittal.

United States citizenship carries with it many personal rights of a higher standing than ordinary economic interests. Few benefits within the power of government are more cherished and few alter so fundamentally the whole way of life of the recipient. "New relations and new in-

terests flow, once citizenship has been granted". *Baumgartner* v. *United States*, 322 U. S. 655, 675 (1944). Revocation of citizenship and deportation are penalties for which there is no parallel in civil proceedings. This Court has analogized such proceedings to criminal cases as regards the burden of proof. *Schneiderman* v. *United States*, 320 U. S. 118 (1943), *Gonzales* v. *Landon*, — U. S. —, 100 L. ed. (Advance p. 136). Denaturalization may result in the loss "of all that makes life worth living * * * the fate of a human being is at stake * * *" (*Knauer* v. *United States*, 328 U. S. 654, 659 (1946). Mr. Justice Rutledge described a denaturalization proceeding as a "harrowing process" (Concurring opinion in *Schneiderman* v. *United States*, 320 U. S. at 166-67).

What is more logical than to assume that Congress wished to assure that denaturalization proceedings could be maintained only if there was some procedural equivalent of arraignment and indictment? The furnishing of affidavits is a simple matter for the Government if it has an adequate basis for commencing proceedings.

The affidavit showing good cause does not involve any duplication of procedure as the Government asserts (Br., pp. 16-17). The purpose is not to obtain a sworn statement of bona fides by the prosecuting officer, but to bring the provable facts before the court for a preliminary determination of their sufficiency. A complaint like this one does not, by virtue of a verification clause, constitute the equivalent of the affidavit. The complaint here lacks in details which such an affidavit might supply. Congress could not have deemed sufficient an affidavit stating that the defendant was a member of the Communist Party and other organizations controlled by or affiliated with it. This is a mere conclusion from undisclosed evidence. An affidavit should state the names of these organizations and the overt acts upon which the Government relies to prove defendant's membership. Cf. *United States* v. *Remington*, 191 F. (2d) 246, 250 (2nd Cir., 1951) cert. den. 343 U. S.

907 (1952). Similarly Congress could not have intended that the courts be required to accept the second-hand statements of investigators where first hand testimony is available. (*Cf. United States* v. *Sherrock*, 276 Fed. 30, D. Mont., 1921). The District Court should be furnished now with the affidavits of those who assert defendant committed fraud and the substance of their testimony against him, and the Court should decide whether good cause is shown for proceeding further.

The affidavit does not present any opportunity for two trials (Cf. Gov. Br., p. 17). Defendant does not claim any right to cross-examine or to call witnesses in his own behalf in determining the sufficiency of the affidavit, any more than he would in a motion addressed to the complaint itself. The requirement that good cause be shown means only that the Government must furnish the Court with sworn statements by persons having personal knowledge of the facts which on their face, unchallenged and unexplained, would justify revocation of citizenship.

This does not involve a meaningless repetition of action. A pervading theory of our Constitution and laws is the checking and balancing of executive power by judicial power. The question here, as often under our laws, is not whether the United States Attorney is acting in good faith, as the Government repeatedly asserts (Br., pp. 2, 5, 9). Rather the question is whether he has complied with procedures insisted upon by Congress to assure that no one occupying his office will cause unjust injury to others. The judicial check here as elsewhere is the mechanism by which the liberty of citizens is preserved.

American citizenship was a precious possession in 1906 as it is today. It is not only most consistent with the statute, its legislative history and its principal judicial interpretations, but it is essential for the protection of citizens, that the provision for an affidavit of good cause be made fully effective as a condition precedent to any action.

CONCLUSION

The order and judgment should be affirmed.

Dated: New York, January 16, 1956.

Respectfully submitted,

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